Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

PETITION IN OPPOSITION TO A WRIT OF CERTIORARI.

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1. Whether or not this Court should review a State Court's ruling upholding the seizure of 8 and super 8mm films and pictorial magazines, which were being exhibited to the general public, at the oral direction of a duly elected Justice of the Peace, who was legally inside petitioner's store pursuant to a search warrant and who viewed as much of the films and magazines as he deemed necessary to determine whether or not there was reasonable cause to believe that the film or magazine was obscene, and when the films and magazines seized were recorded on the search warrant and the search warrant guaranteed petitioner the right to a full, prompt adversary hearing, to review the Judge's preliminary determination of obscenity?

2. Whether or not this Court should review a case in which petitioner has failed to pay a fine, which was due after State Appellate Court review was completed; when after his conviction petitioner has voluntarily vacated the store and turned the store over to a new corporate entity?

Constitutional and Statutory Provisions Involved.

In addition to those mentioned by petitioner, the pertinent provisions of Section 235.00, Subdivision 1 of the State of New York Penal Law (*McKinney's Consolidated Laws of New York*, 1967 ed., as amended by New York Law 1974, Chapter 89, Section 1) are set forth in Appendix A hereto.

Statement of the Case.

On June 20, 1976, New York State Police Investigator J. A. Hurbanek bought two films entitled *Linda and Duke* and *Four For Dinner* from Mr. Alex Mandakis, the manager of Lo-Ji Sales, Inc.'s Adult Store (hereinafter the store), in Wawayanda, New York. While at the store Investigator Hurbanek learned from Mr. Mandakis that other films in the store, and the books and magazines in the store contained sexually explicit material similar to the type and character of the material that was in the two above entitled films.

After Investigator Hurbanek personally viewed both films in their entirety, he asked Town of Wawayanda Justice O'Connor to independently view the films so that the Judge could determine for himself whether or not there was reasonable cause to believe that these sexually explicit films were obscene under the Penal Law of the State of New York.

On June 25, 1976, at approximately 9:00 A.M., Town Justice O'Connor viewed both films, in their entirety at the Orange County District Attorney's Office, Goshen, New York. Thereafter Investigator Hurbanek asked Judge O'Connor to accompany him to the store so the Judge could determine whether or not there was reasonable cause to believe that other sexually explicit material was also obscene under the New York State Penal Law. At approximately 10:30 A.M. in the Town of Wawayanda, Investigator Hurbanek signed the affidavit in support of the search warrant, and Judge O'Connor then issued the search warrant which formed the basis for the search in the case at bar.

At the time the Judge signed the search warrant, it read as follows:

> LOCAL CRIMINAL COURT
> TOWN OF WAWAYANDA
> COUNTY OF ORANGE
> STATE OF NEW YORK
>
> HONORABLE JOHN O'CONNOR,
> ISSUING JUDGE.
>
> TO ANY POLICE OFFICER OF THE NEW YORK STATE POLICE:
>
> You are hereby authorized and directed to search the following premises: a single story brown wood frame building named "Adult Store", located on Route 17M directly across from the Chadwick Motel in the Town of Wawayanda, Orange County, New York.

You are hereby authorized and directed to search for and seize the following property, to wit:

1.) 200 foot reels of 8mm motion picture film entitled LINDA AND DUKE.

2.) 200 foot reels of super 8mm motion picture film entitled FOUR FOR DINNER.

3.) The following items that the Court independently has determined to be possessed in violation of Article 235 of the Penal Law.

This warrant must be executed not more than 10 days after the issuance and any property seized pursuant hereto shall be returned and delivered to the Court without unnecessary delay.

The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law.

DATED: Goshen, New York
June 24, 1976.

Local Justice

At approximately 11:13 A.M., Judge O'Connor and Investigator Hurbanek entered the store. Investigator Hurbanek told Mr. Mandakis that he had a warrant for his arrest (this warrant was also signed by Judge O'Connor that morning) and that Judge O'Connor was there to conduct a search of the store. Investigator Hurbanek then advised Mr. Mandakis of his rights under the Fifth and Sixth Amendments to the United States Constitution.

Judge O'Connor viewed parts of 23 films being shown to the public in money operated machines in the front room of the store and then viewed parts of the four films being shown to the public in money operated machines in the rear of the store until he was satisfied that there was reasonable cause to believe that the film was obscene under the Penal Law of the State of New York; and upon making that determination, orally directed the police to seize 26 of the films.

After viewing the films in the rear room, the Judge returned to the front room of the store where magazines were being displayed to the public on tables and three walls. The Judge looked through enough of each magazine so that he could determine whether there was reasonable cause to believe that the individual magazine was obscene under the New York State Penal Law; and if the Judge was satisfied that there was reasonable cause to believe that the magazine was obscene, he directed the police to seize each and every copy of the magazine being displayed to the public. It should be noted that the Judge did not order the police to seize every magazine that he viewed; and accordingly, those magazines that the Judge did not deem obscene were left in the store. After viewing the magazines, the Judge went to a counter in the front room of the store which contained films in boxes. On the outside of each box there was a still picture. Mr. Mandakis, the person in charge of the store, told the Judge that it was not necessary to view the film inside the box because all the films were "sex films" and that the picture on the box showed what the film was all about. The Judge then viewed the pictures on the box. If he was satisfied from viewing the pictures that there was reasonable cause to believe that the film inside was obscene under the Penal Law, he directed the police to seize it.

The Judge left the store at approximately 5:00 P. M. and at that time the police transported to New York State Police Headquarters, Middletown, New York, all the items that the Judge directed be seized. Between 5:30 P. M. and 11:00 P. M. the police listed on the search warrant the additional items that the Judge had orally directed they take from the store. Investigator Hurbanek then brought the search warrant to the Judge.

During the entire period that the search was conducted the store was open to the public. Mr. Mandakis moved freely throughout the store during the entire day.

On June 26, 1976, the day after the search, the store was again opened for business.

On July 15, 1976, petitioner was charged with three counts of Obscenity in the Second Degree, in violation of the provisions of Section 235.05, Subdivision 1 of the Penal Law of the State of New York. The subject of the first count was approximately 400 magazines seized at the direction of Judge O'Connor during the course of the search from the tables and walls in the front part of the store. The subject of the second count was approximately 474 reels of film which were seized from the counter in the front of the store at the direction of Judge O'Connor during the course of the search. The subject of the third count was 26 rolls of film seized from the money operated machines in the front and rear of the store at the direction of Judge O'Connor during the course of the search.

By motion dated July 29, 1976, petitioner, through his attorneys, moved to suppress the evidence seized from the store on June 25, 1976. With the consent of the petitioner's attorney and the People, a suppression hearing was scheduled and held on August 27, 1976, at 2:00 P.M. Prior to

the hearing, petitioner asked Judge O'Connor to disqualify himself on the ground that petitioner intended to call the Judge as a witness. Accordingly, the Judge disqualified himself and Town of Wawayanda Justice Frank Giza conducted the hearing. Town Justice Giza submitted written findings of fact and conclusions of law dated November 13, 1976.

On February 3, 1977, petitioner, through his attorneys, pled guilty to all three counts of Obscenity in the Second Degree and was fined $1,000 on each count.

Pending petitioner's appeal to the State Appellate Courts, the State of New York and the Local Justice agreed to stay imposition of the $3,000 fine.

In March of 1977, petitioner abandoned the store and a new corporate owner, Gorunga Inc. took over possession of the store.

Petitioner appealed Judge Giza's decision to the Appellate Term, Ninth & Tenth Judicial Districts, Supreme Court, State of New York, and on April 25, 1978, the Appellate Term upheld the determination of Town Justice Giza.

Thereafter, on July 5, 1978, the New York Court of Appeals denied petitioner's leave to review the Appellate Term's decision.

After the New York Court of Appeals refused to review petitioner's appeal, petitioner refused to pay the fine of $3,000 which had been stayed.

ARGUMENT.

1.

The Court should not review a State Court's ruling upholding the seizure of 8 and super 8mm films and pictorial magazines, which were being exhibited to the general public, at the oral direction of a duly elected Justice of the Peace, who was legally inside petitioner's store pursuant to a search warrant and who viewed as much of the films and magazines as he deemed necessary to determine whether or not there was reasonable cause to believe that the film or magazine was obscene, when the films and magazines seized were recorded on the search warrant and the search warrant guaranteed petitioner the right to a full, prompt adversary hearing, to review the Judge's preliminary determination of obscenity.

There is no reason for the Court to review the decision of the New York State Courts. This case involves application of the holding of *Heller v. New York,* 413 U. S. 483 (1973), to 200 foot reels of 8mm film and pictorial magazines, which contained captions under some of the pictures or a small amount of written material describing verbally acts which the pictures depict.

In *Heller v. New York,* this Court stated on page 493:

> With such safeguards (the safeguards of a judicial screening prior to any seizure and the safeguard of a prompt judicial determination of obscenity in an adversary proceeding following the seizure), we do not perceive that an adversary hearing prior to a seizure by lawful warrant would materially increase First Amendment protection. Cf. *Carroll v. Princess Anne, supra,* at 183-184, 21 L. Ed 2d

> 325. The necessity for a prior judicial determination of probable cause will protect against gross abuses while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation. The procedure used by New York in this case provides such First Amendment safeguards, while also serving the public interests in full and fair prosecution for obscenity offenses.

The fact that the warrant was expanded to include the material ordered seized by the Judge upon his viewing of it at the store, does not change the fact that this case is governed by the principles announced in *Heller v. New York, supra.* The holding of *Heller v. New York, supra,* is that there must be a prior judicial screening before the material is seized.

> "(I)t had undoubtedly become a settled principle that a Judge must decide preliminarily whether or not the particular material on which he is asked to authorize seizure is obscene and that this must not be left open to the judgment of the police." *People v. Abronovitz,* 31 N. Y. 2d 160, 165.

The Courts have never set rigid procedures to be followed in issuing search warrants, *People v. Brown,* 40 N. Y. 2d 183. The Courts have realized that application for search warrants and search warrants themselves must be flexible enough to take into account the exigencies of each individual case. In *People v. Brown, supra,* the New York Court of Appeals held that an oral affidavit which was stenographically recorded satisfied the requirements of the New York Criminal Procedure Law and Common Law.

In the case at bar, the search warrant satisfied the requirements of the New York Criminal Procedure Law and Common Law. Every item seized was recorded in writing in the search warrant. The Judge viewed every piece of material before it was seized. Rather than take the time to record the name of the items to be seized on the search warrant at the store, and then directing the police to seize the item, the name of the item was recorded after the search in a quiet setting with a stenographer present. The purposes of having a search warrant in writing are twofold: One, it eliminates the police officer's discretion; and two, it ensures that there is an accurate record of everything that is taken. The procedure followed in the case at bar satisfied both these purposes.

Clearly, there is no other way for any seizure of obscene films and magazines to occur. Under the law, the police officer cannot make the initial determination of obscenity by himself and then bring the material to the Judge for subsequent initial review, *People v. Abronovitz, supra.* Thus, the only alternative is for the Judge to come to the store himself and to make the initial determination of the obscenity in the store, *Heller v. New York, supra.* While the Judge is in the store, he certainly can observe what is openly displayed to the public and review it at the store. See *People v. Matherson,* 16 N. Y. 2d 509. Otherwise, there would be no efficient and effective way of bringing obscene material before a Court without expending public funds to purchase this illicit material.

The fact that the Judge did not view the material in its entirety before deciding whether or not reasonable cause existed for its seizure does not change the principles to be applied. *Miller v. California,* 413 U. S. 15, and *Roth v. United States,* 354 U. S. 476, articulated the standard to be used by the trier of facts in the "final" adjudication of whether the material is obscene. It must be left

to the sound discretion of the reviewing Judge to determine how thoroughly he feels that he must initially review the individual piece of material in order to determine whether or not reasonable cause for its "temporary seizure" exists. This is especially true when a defendant has been offered a prompt, full adversary hearing after the seizure on the issues of whether or not the material is, in fact, obscene. The movies in the money operated machine were not full length movies, but rather the kind that can be viewed for a small quantity of quarters. Certainly the Judge could fairly determine whether or not reasonable cause to seize the film existed by viewing two to five minutes of these short films. The magazines in question basically contained just pictures or pictures with captions. It would not take more than a few seconds to fairly determine whether or not reasonable cause existed to seize this type of magazine. Mr. Mandakis, the clerk of the store, told the Judge that the pictures on the film boxes showed what the "sex films" contained therein were basically about. With that admission all the Judge had to do was to look at the picture on the box to make a reasonable preliminary determination about their obscenity.

The fact that more than one copy of the magazine or film was temporarily seized also does not change the principles to be applied. It is the petitioner's position that whenever more than one copy of a piece of material is seized, then the seizure is automatically equivalent to a final restraint on the distribution of the material. Respondent submits that this position is totally falacious. Petitioner is confusing the safeguard of a prior judicial screening before any seizure with the safeguard of a full, prompt adversary hearing following the seizure. As long as petitioner is offered a prompt, full adversary hearing to determine whether or not the material is obscene, it does not matter if one, two or ten pieces of the material are temporarily seized pending this hearing.

Likewise, the fact that the quantity of 8mm films and pictorial magazines numbered approximately 900 items does not change the principles to be applied. Citing *People v. Abronovitz, supra; A Quantity of Books v. Kansas,* 378 U. S. 205, and *Marcus v. Search Warrant,* 367 U. S. 717, petitioner argues that the magnitude of the search in the case at bar is a *per se* violation of constitutional rights. But, as the Court said in *Heller v. New York, supra,* 491:

> "Those cases (*A Quantity of Books v. Kansas, supra,* and *Marcus v. Search Warrant, supra*) concerned the seizure of a large quantity of books for the sole purpose of their destruction and this Court held that, in those instances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books".

This case is different from the cases cited by petitioner because one, there was a judicial screening prior to any temporary seizure and because two, the material was seized solely as evidence and the defendant was afforded the right to a full and prompt adversary hearing on the issue of obscenity.

The case at bar is also different from the cases cited by petitioner because all of the materials viewed by the Judge and subsequently seized by the police at the Judge's direction were in the part of the store that was open to the public.

2.

This Court should not review a case in which petitioner has failed to pay a fine, which was due after his State Appellate Court review was completed; when after his conviction petitioner has voluntarily vacated the store and turned the store over to a new corporate entity.

Since petitioner is a corporation, under New York Law, only the corporate entity can be punished. Section 60.25 of the New York Penal Law, *McKinney's Consolidated Law of New York,* Anno.

Since the petitioner has voluntarily vacated the store and relinquished his possession to a new corporate entity, it is respectfully submitted that petitioner is attempting to place himself beyond the jurisdiction of New York Law. Therefore, this Court in its discretion should decline review of this case. See *Estelle v. Dorrough,* 420 U. S. 534 (1975), Rehearing denied, 421 U. S. 921; *Eisler v. United States,* 338 U. S. 189 (1949).

Conclusion.

For the foregoing reasons, a Writ of Certiorari should not issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory Provisions.

§60.25 Authorized dispositions; corporation

When a corporation is convicted of an offense, the sentence of the court shall be as follows:

(a) A fine authorized by section 80.10; or

(b) Where authorized by section 65.05, a period of conditional discharge as provided in that section; or

(c) Where authorized by section 65.20, unconditional discharge as provided in that section.

In any case where a corporation has been sentenced to a period of conditional discharge and such sentence is revoked, the court shall sentence the corporation to pay a fine.

§235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" is (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.